



RECEIVED
MAY 02 2003
TC 1700

PATENT
Attorney Docket No. 59405
Express Mail Label No. EV 172994940 US

REMARKS

Reconsideration in view of the foregoing Amendments and the following remarks is respectfully requested. Moreover, the Applicants have reviewed the Office Action of January 31, 2003 and submit that this Amendment is responsive to all points raised therein.

Rejection Under 35 U.S.C. §112

Claims 1 through 11 were rejected under 35 U.S.C. § 112 second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.

In Claim 1, the Examiner specifically objected to the phrase "wherein between 50-90% by weight of said food product used to form the product" as confusing and indefinite because of the reference to "food product" and "product". Applicant has amended Claim 1 by inserting "constituent" after grain at line 3 and line 6. Also, the phrase "food product" at line 4 has been replaced with "grain constituent" and the phrase "said food" has been inserted in front of product at line 4. These amendments are supported by the specification and should clarify the language rejected by the Examiner as indefinite. Since the amendments to the claims are supported by the specification no new matter has been added.

The Examiner also argues the term "elevated glycemic index" is indefinite because there is no comparative basis. The "glycemic index" (GI) is measured based on tests through a rapidly available glucose assay (RAG). The correlation between RAG and GI is discussed on page 2, lines 3-12 of the present application. The chart on page 3, line 6 of the application demonstrates GI or RAG levels in typical food products. As explained on page 3, line 19 a GI below 55 is considered to be desirable.

On page 9, lines 3-7 of the present application the invention is taught as lowering the RAG/GI as compared with other types of snacks or cereals, generally 5% lower. This is supported through the illustration of Example 3 on page 16 on the last table of the page. It is shown that when Prowashonupana barley is mixed with other grain constituents the extruded RAG is lower than blends without Prowashonupana barley. As such, the specifications of the present application teach that when Prowashonupana barley is blended with other grain constituents a method for not contributing to an elevated glycemic index is produced. Therefore, the phrase "elevated glycemic index" from Claim 1 and Claim 6 is explained in sufficient detail and is definite.

The Examiner further argues that Claim 1 is rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter that was not described in the specification in sufficient detail to enable one skilled in the art to make or use the invention. Specifically, the Examiner argues that the amount of the food product to be consumed to not contribute to an elevated glycemic index is not taught. The specification describes a method of producing a food product with a low glycemic index. Therefore, anytime a food product is consumed that is produced according to the present invention the glycemic index will not be elevated in an individual as compared to other typical food products. By consuming any amount of products, such as those taught in the present invention, an individuals glycemic index will be lowered compared to the same amount of consumption of food products not using the present invention.

Rejection under 35 U.S.C. § 103(a)

Claims 1 through 11 were rejected under 35 U.S.C. §103(a) "as being unpatentable over Becker et al., U.S. Patent 4,568,557 (the '557 patent) in view of McWard, a journal article titled "Integrating value: specialty flours and grains" Baking and Snack, 1995 (McWard).

The Examiner's argument for rejection is based on the '557 patent, which discloses an invention related to a process for making a snack food product. The food product contains an amount of dietary fiber with an oil derived from a food grade product to form a pre-mix (1). The dietary fiber is a mixture of corn bran and corn germ. In addition, the food product contains a coating compound, pre-mix (2), composed of an amount of fractionated fat, a sweetener, milk solids, yogurt, and a flavoring agent. The pre-mix (1) and pre-mix (2) are blended together, along with a cereal product, for the desired texture, and extruded at a temperature between 100° F to about 125° F (37° C to 52° C). The extrusion temperature is congruent with forming extrusion, which is used, in processing a food product into a desired shape.

The '557 patent discloses that it is critical to the invention to allow the dietary fiber to be mixed with a high fat ingredient in order to develop flavor and taste. The '557 patent also teaches that it is critical to combine the fiber with a compound coating which also must contain a fat portion and at least one sweetener, "it must be sufficient in physical make-up to provide adequate bulk and texture" (column 7, line 50). Further, the '557 patent relies on extrusion at temperatures between 37° C to 52° C to melt the fat contained in the food product and properly crystallize and hold the product shape subsequent to extrusion and cooling (column 7, lines 12-16). Extrusion at this low of a temperature is indicative of forming extrusion that is used to process the food product into a desired shape, rather than cooking the food product. Thus, the requirements in the '557 patent of a high fat ingredient, a sweetener, and use of forming extrusion directly teach away from the claims of the current invention.

The '557 patent does not teach the production of a food product without the addition of a high fat ingredient, such as the oil in the pre-mix (1) or a compound coating, such as described in pre-mix (2). Nowhere does the '557 patent teach mixing Prowashonupana barley with a grain

constituent to form a grain mixture which is extruded at temperatures between 66° C to 120° C to form snack products. Extrusion at the temperature in the present application is cooking extrusion and will cause the food product to be cooked. This differs from the forming extrusion of the '557 patent that uses extrusion merely to form a food product that is generally more dense and is of a chewy nature as compared to a product formed through cooking extrusion. Nowhere does the '557 patent teach using temperatures that are high enough to cause cooking extrusion thus the food product produced in the '557 patent will be a chewy food product with a higher density. Therefore, the present invention is not disclosed, taught, or suggested by the cited prior art reference.

The Examiner further argues that the present invention is obvious when the '557 patent is viewed with the McWard publication. McWard teaches using Prowashonupana barley in place of other grain constituents to form products that are determined to be high in fiber and beneficial in controlling diabetes. All arguments from above are relevant for overcoming this rejection.

As previously mentioned, the '557 patent requires that it is critical to the invention to allow the dietary fiber to be mixed with a high fat ingredient, a compound coating which must contain a fat portion, and at least one sweetener. The mixture is then extruded at temperatures between about 37° C to 52° C; this temperature range is congruent with "forming extrusion" that is used to produce food products of a desired shape but does not cook the food product. Even if Prowashonupana barley is used as the source of dietary fiber, as described in the McWard publication, instead of the corn bran or corn germ as taught in the '557 patent, the present invention is still distinguished.

Nowhere, does the combination of the '557 patent and the McWard publication teach mixing Prowashonupana barley with another grain constituent in order to form a grain mixture,

which is then extruded at temperatures high enough to "cook" the extruded product, 66° C to 120° C, and thus change its final texture. Furthermore, the combination of the cited prior art references do not teach a food product that is produced without a high fat ingredient, a compound coating, and forming extrusion in order to produce a final food product. As such, the present invention is not taught, suggested, or made obvious by any of the cited prior art references either alone or in combination.

For the above discussed reason, it is asserted that none of the cited references, either alone or in combination, teach, suggest, or make obvious the present invention, and in particular, a method of using a grain constituent composed of Prowashonupana barley with other grains whereby extruding and cooking the grain constituent to produce a food product that contributes to a lowered glycemic index when consumed.

A terminal disclaimer has been filed pursuant to the nonstatutory double patenting rejection based on the judicially created doctrine raised by the Examiner. Enclosed is a terminal disclaimer in compliance with 37 CFR 1.321(c) filed by the Applicant to overcome the rejection. The terminal disclaimer fee due according to 37 CFR 1.20(d) should be charged to the Deposit Account No. 50-1662.

Should the Examiner have any questions or comments as to the form, content, or entry of this paper, the Examiner is requested to contact the undersigned at the telephone number below. Similarly, if there are any further issues yet to be resolved to advance the prosecution of this application to issue, the Examiner is requested to telephone the undersigned counsel.

Allowance of all pending claims, claims 1-11 is respectfully requested.

Respectfully submitted,

POLSINELLI SHALTON & WELTE, P.C.



Patrick C. Woolley, Reg. No. 39,078
700 W. 47th Street, Suite 1000
Kansas City, Missouri 64112
Tel: (816) 360-4280
Fax: (816) 753-1536
Attorney for Applicant

26500 / 59405
PCWOO 1004728